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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 93-1660

STATE OF ARIZONA, *Petitioner*

v.

ISAAC EVANS, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether an exception to the exclusionary rule should be created for evidence seized following an arrest based upon a withdrawn warrant.

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This amicus brief is filed pursuant to Rule 37 of the United States Supreme Court. Both petitioner and respondent have granted amicus consent to file this brief, and the letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership of more than 8,000 attorneys and

28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's stated objectives is the proper administration of criminal justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the criminal justice system is protected. This includes an overriding interest in the promulgation of rules of procedure that insure the constitutional rights of citizens accused of crime.

STATEMENT OF THE CASE

A. The Unlawful Arrest and Warrantless Search

On January 5, 1991, Isaac Evans was stopped by Phoenix police officers for driving the wrong way on a one-way street in front of the main police station. (J.A. at 17.) Upon being stopped and asked for his driver's license, Mr. Evans responded that his license had been suspended. (Id. at 17-18.) The officer then ran Mr. Evans' name on a computer in his patrol car, and was informed that there was an outstanding misdemeanor arrest warrant for him. (Id. at 19.)

solely because of this outstanding misdemeanor arrest warrant, and for no other reason, the officer placed Mr. Evans under arrest. (Id. at 23-24.)

During the process of handcuffing Mr. Evans, a handrolled cigarette fell from one of his hands. (Id. at 20.) The officer seized the cigarette and determined that it was marihuana. (Id. at 21.) The automobile was searched and additional marihuana was found. (Id. at 22.) The arresting officer testified that the justification for the search of the vehicle was that it was incident to the arrest. (Id.) There is no testimony that the officers feared for their safety or would have searched Mr. Evans or the vehicle other than as an incident to the arrest.

B. The Suppression Hearing

After being charged with possession of marihuana, Mr. Evans filed a motion to suppress on the basis that his arrest was violative of the Fourth Amendment. (J.A. at 2.) His basic contention was that the warrant which purported to authorize his arrest had been quashed prior to January 5, 1991. (Id. at 4.) The evidence at the suppression hearing showed that on December 12, 1990, Mr. Evans failed to appear in the East Phoenix Justice Court. (Id. at 28.) The next day a bench warrant was issued. (Id. at 29.) On December 19, 1990, Mr. Evans appeared in justice court and this warrant was quashed. (Id. at 29.)

The clerk of the justice court testified that the general procedure the clerks follow when quashing a warrant is to advise the jail or the warrant section that the warrant has been quashed, and then note on the file to whom the clerk provided this information. She said that Mr. Evans' file did not contain such a notation. (Id. at 29.) This indicated to her that the sheriff's office had not been notified the warrant was quashed, (Id. at 30.), although she admitted that she could not actually tell whether that was true, or whether someone made the call and merely forgot to note it. (Id. at 32.)

A clerk at the Operations Information Center of the sheriff's office testified as to the procedure they followed when they received a call from a court clerk advising them of a warrant recall. (Id. at 39-40.) She further testified that the list of recalled warrants they kept did not show that they received notification of a recalled warrant on Mr. Evans during the applicable time periods. (Id. at 41-43.) Her testimony was based on custom and practice, and she could not rule out the possibility that they received such a call, but failed to record it. (Id. at 43.)

The trial court granted Mr. Evans' motion to suppress the evidence seized pursuant to the unlawful arrest. The court did not find it necessary to make a definitive finding as to whether the justice court or the sheriff's office was at fault in failing to ensure that the warrant was removed from the sheriff's office computers. The court's reasoning was that in either event it was negligence on the part of the state, and the law required suppression. (Id. at 51-53.)

C. The Appellate Rulings

The Arizona Court of Appeals reversed the trial court's order granting the suppression motion. The court found that the purpose of the exclusionary rule was to deter unlawful police conduct. (Pet. App. at 32a.) The court apparently interpreted the word "police" in a literal fashion, since it held that the "exclusionary rule is not intended to deter justice court employees or Sheriff's Office employees who are not directly associated with the arresting officers or the arresting officers' police department." (Id. at 34a.) It is clear that the court felt the proper focus was on only the law enforcement agency executing the actual arrest, and that the collective knowledge of law enforcement should not be considered.

The Arizona Supreme Court reversed the court of appeals and reinstated the trial court's ruling suppressing the evidence seized pursuant to the unlawful arrest. The court noted that the hearing testimony did not clearly establish who was at fault for the failure to enter the warrant recall in the computer records, but went on to hold that the exclusionary rule should be applied even if the fault was that of the justice court clerk. (Id. at 5a, 8a.) The court found Leon distinguishable because it involved a search pursuant to a warrant, rather than a warrantless arrest and search, and also found the "good faith" analysis to be of little value under the facts of this case (Id. at 6a-7a.) The issue of whether the error was made by a court employee or a law enforcement employee was not deemed significant. (Id. at 8a-9a.) The court felt the important principle was that a citizen should not be subject to arrest based on a warrant that had been recalled, and that the exclusionary rule could serve as a valuable deterrent to governmental negligence in situations such as those reflected by the facts of this case. (Id. at 9a-11a.)

SUMMARY OF ARGUMENT

This Court has recognized only limited exceptions to the application of the exclusionary rule to unlawfully seized evidence. The exceptions created by the Court in Leon and Krull recognize distinct situations where a law enforcement officer has been directed to conduct a search by an independent judicial or law-making authority. The "good-faith" test of Leon was not meant to apply other than in carefully delineated situations. It cannot be used as a talisman to undermine the manner in which courts interpret the proper functioning of constitutional principles.

This Court's previous rulings do not support an additional exception to the exclusionary rule to permit the introduction of evidence seized pursuant to a warrantless search following an unlawful arrest. The right to conduct a warrantless search incident to a lawful arrest is itself an exception to the warrant requirement. Crafting a further exception to the exclusionary rule permitting the admission of evidence seized pursuant to an arrest effected without probable cause would be tantamount to letting the exceptions swallow the Fourth Amendment.

There is no reasoned distinction between "law enforcement" agencies and "civilian" agencies when it comes to applying the exclusionary rule in a situation such as that represented by Mr. Evans' case. The fact that a "non-law enforcement" clerk may have been responsible for the failure to withdraw the arrest warrant from the computerized data bank does not shield the police department's actions in conducting an unlawful arrest. This Court should not adopt a policy that will permit law enforcement to act as passive recipients and repositories of inaccurate data, let alone adopt a policy that provides a disincentive to ensure the accuracy of data relied upon by law enforcement to impinge upon the freedoms of the citizenry.

ARGUMENT

THE CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURE WILL BE UNDERMINED BY PERMITTING THE ADMISSION OF EVIDENCE SEIZED PURSUANT TO A WARRANTLESS SEARCH INCIDENT TO AN UNLAWFUL ARREST

This Court has consistently recognized the principle that the Fourth Amendment dictates that searches be conducted pursuant to warrant. The few circumstances that justify a warrantless search are jealously and carefully prescribed. Coolidge v. New Hampshire, 408 U.S. 443, 454-455 (1971).[1] The recognition of this principle is important in framing the issue before the Court in this case, because it must be borne in mind that this case actually involves the deprivation of two rights. The first is the defendant's right to be free from an unlawful seizure of his person, and the second is the right to be free from an unreasonable search. There is no doubt that under the general facts presented by this case, the warrantless search of the defendant, independent of a valid arrest, was unconstitutional as totally lacking in probable cause and not fitting within any of the recognized

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[1] See, e.g., Chimel v. California, 395 U.S. 752 (1969)(search incident to valid arrest); Terry v. Ohio, 392 U.S. 1 (1968)(search pursuant to investigative stop); Chambers v. Maroney, 399 U.S. 42 (1970)(vehicle search based on probable cause); Colorado v. Bertine, 479 U.S. 367 (1987)(inventory search); Almeida-Sanchez v. United States, 413 U.S. 266 (1973)(border search); Warden v. Hayden, 387 U.S. 294 (1967)(exigent circumstances).

exceptions to the warrant requirement.[2] Thus, under settled constitutional doctrine, the invalidity of the defendant's arrest rendered the warrantless search in this case unconstitutional.

The State of Arizona takes the position that an officer's so-called "good faith" mistake as to the existence of an outstanding arrest warrant should serve as a substitute for both probable cause to arrest and a search warrant. The holdings of this Court do not support a result that would render nugatory both the seizure and search provisions of the Fourth Amendment.

A. The Exclusionary Rule Serves To Insure That Law Enforcement Will Only Interfere With The Rights Of The Citizenry Pursuant To Well-Defined And Structured Legal Precepts

This Court first acknowledged the necessity of the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). In Wolf v. Colorado, 338 U.S. 25 (1949), the Court reaffirmed its belief in the exclusionary rule, but found that at that time the due process clause did not require extension of the exclusionary rule to the states. This view changed 12 years later in Mapp v. Ohio, 367 U.S. 643 (1961), where the Court overruled that portion of Wolf which declined to extend the exclusionary rule to the states, and held that such a result was constitutionally required. The Court's basic belief in the validity of the exclusionary rule has remained unchanged for

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[2] It is clear from reading the record of the suppression hearing that the officer did not feel threatened by the defendant in any way; nor did the officer give any impression that, in the absence of discovering the withdrawn warrant, he intended to conduct a search.

80 years. This Court has only modified the exclusionary rule, and permitted the admission of otherwise improperly seized evidence as part of the prosecution's case-in-chief, when the subject searches or seizures occurred within a well-established legal framework.

Only two basic situations have warranted exceptions to this Court's founded belief that the exclusionary rule is necessary to restrict the presentation of evidence during the prosecution's case-in-chief. One is the situation where the evidence is seized pursuant to a statute that is later declared unconstitutional. See Michigan v. DeFillippo, 443 U.S. 31 (1979); Illinois v. Krull, 480 U.S. 340 (1987). The other is where the evidence is seized pursuant to a search warrant that is later declared to be invalid. See United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984). In both types of cases, the directive to conduct a search has been authored by other than the law enforcement authorities. In the first situation, the legislature has directed that a search or seizure should be made and law enforcement is merely following that dictate. In the second situation, an independent magistrate has made the decision as to the propriety of the search. "In both Leon and Krull, the touchstone of the Court's decision was the police officer's objectively reasonable reliance on the determination of a magistrate or a legislature that the challenged search in fact met the standards required by the fourth amendment." United States v. Warner, 843 F.2d 401, 405 (9th Cir. 1988).

The significance of the "other-directed" search was stressed by the Court in Leon. This Court made the point that in a search warrant situation, the exclusionary rule could be modified somewhat without jeopardizing its ability to perform its intended functions. This was possible in the search warrant context because the search had been directed by a neutral and detached magistrate. Leon, 468 U.S. at 905. Under such circumstances, the exclusionary rule was deemed

to have negligible deterrent value upon law enforcement, and since deterrence is the purpose to be served by the exclusionary rule,[3] its application in such a situation was deemed unwarranted.

One should not minimize the significance of the "other-directed" aspects of the exceptions to the exclusionary rule for cases where the government seeks to admit unconstitutionally seized evidence in its case-in-chief. It is the essential component to the so-called "good faith" test. The Leon court itself acknowledged this when it noted that "good faith on the part of an arresting officer is not enough, and that if subjective good-faith alone were the test, protections would exist only in the discretion of the police." Leon, 468 U.S. at 915 n. 13. Thus, in the Leon situation, an

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[3] The Leon Court dealt with the deterrent effect of suppression on law enforcement officials as the only purpose to be served by the exclusionary rule. Although this has been the purpose most often discussed by this Court in recent opinions, this has not historically been the only reason for the exclusionary rule. While amicus asserts that applying the exclusionary rule to the facts of this case will have a deterrent effect on law enforcement authorities, amicus also invites the Court to reexamine the view that the only purpose to be served by the exclusionary rule is the narrow one of deterring law enforcement. See Yale Kamisar, Does (Did)(Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than on an "Empirical Proposition?", 16 Creighton L. Rev. 565, 565 n. 1 (1983)("Until the exclusionary rule rests once again on a principled basis rather than an empirical proposition, as it did originally and for much of its life, the rule will remain in a state of unstable equilibrium.")(emphasis in original).

essential component of the objective good-faith test is that objectivity is being supplied by the intervening magistrate.[4] This is what enabled the Court in Leon to hold that in the search warrant context, "the exclusionary rule can be modified somewhat." Leon, 468 at 905.

The importance of the presence of a neutral and detached magistrate as a justification for encroaching on the exclusionary rule has been recognized by many lower courts.[5] Additionally, even staunch supporters of the result

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[4] In Massachusetts v. Sheppard, 468 U.S. 981 (1984), the Court addressed the fact that the officers' conduct was objectively reasonable. Id. at 990. However, Sheppard involved reliance on not only a warrant, but on the magistrate's affirmative representations that the warrant had been altered to reflect correct information. The objective reasonableness at issue was the officer's reliance upon the magistrate's specific representations to him, as opposed to the directive of the warrant itself.

[5] See, e.g., United States v. Curzi, 867 F.2d 36, 44 (1st Cir. 1989)(good-faith exception for searches pursuant to warrant should be accepted precisely as formulated and not applied to warrantless searches); United States v. Merchant, 760 F.2d 963, 968-969 (9th Cir. 1985)(good-faith exception does not exist beyond warrant context); United States v. Wall, 807 F. Supp. 1271, 1277 (E.D. Mich. 1992)(Leon does not modify exclusionary rule where police acted without warrant); United States v. Boffman, 747 F. Supp. 1251, 1253-1254 (S.D. Ohio 1990)(narrow holding in Leon fact specific to search warrant situation and does not modify exclusionary rule for warrantless searches); People v. Mourecek, 566 N.E.2d 841, 845 (Ill. App. Ct. 1991)(Leon only applies to good-faith

reached by Leon have acceded to the view that "the good-faith exception has no place outside the warrant context, a context which provides unique intrinsic indicia of reliability about proposed searches." Donald Dripps, Living with Leon, 95 Yale L.J. 906, 909 (1986).

B. An Exception To The Exclusionary Rule Should Not Be Created For A Warrantless Search Conducted Pursuant To An Invalid Arrest

It is established law that the execution of an arrest pursuant to a warrant, or the execution of a warrantless arrest based upon probable cause, accords the arresting officer the right to conduct a search incident to that arrest. Chimel v. California, 395 U.S. 752, 762-763 (1969). Concomitantly, an arrest lacking in probable cause does not supply the necessary justification for a search. This is true whether the arresting officer is mistaken in his formulation of probable cause, or whether the arresting officer has been directed to effect the arrest by another officer who lacked sufficient information to supply probable cause. See Whiteley v. Warden, 401 U.S. 560, 568-569 (1971). Similarly, an arrest based upon a warrant that has been recalled is unlawful. People v. Ramirez, 668 P.2d 761, 764 (Cal. 1983); State v. Taylor, 468 So. 2d 617, 625 (La. Ct. App. 1985).

The exclusionary rule bars the admission of evidence seized pursuant to a search incident to an unlawful arrest. Whiteley, 401 U.S. at 569. Petitioner seeks the creation of an exception to the exclusionary rule when the officer executing the unlawful arrest does so in "good-faith." However, the adoption of such an exception would require a wholesale

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violations resulting from searches conducted pursuant to technically invalid warrants).

change in the way courts view warrantless searches pursuant to arrests that have no basis in probable cause. Many courts have already confronted this specific issue and held that a police officer's good faith belief he or she is acting reasonably in conducting a warrantless search pursuant to an unlawful arrest does not create an additional exception to the exclusionary rule.[6]

Courts that have confronted this issue have usually grounded their holdings on this Court's decisions in Whiteley and United States v. Hensley, 469 U.S. 221 (1985). The logic of this approach is inescapable. Hensley, decided one year after Leon, reaffirmed the validity of the constitutional precepts set out in Whiteley. Hensley, 469 U.S. at 230-231. The timing of these opinions has led one court to adopt the view that Hensley makes it clear Whiteley was not affected by Leon. See Ott v. State, 600 A.2d 111, 116 (Md. Ct. App. 1992). Although there is an argument that the Hensley Court

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[6] See, e.g., United States v. Warner, 843 F.2d 401, 405 (9th Cir. 1988); People v. Mourecek, 566 N.E.2d 841, 845 (Ill. App. Ct. 1991); Albo v. State, 477 So. 2d 1071, 1073 (Fla. Dist. Ct. App. 1985); People v. Ramirez, 668 P.2d 761, 764 (Cal. 1983); People v. Fields, 785 P.2d 611, 614 (Colo. 1990); People v. Jennings, 430 N.E.2d 1282, 1285 (N.Y. 1981); State v. Trenidad, 595 P.2d 957, 958 (Wash. Ct. App. 1979); but see United States v. Leon-Reyna, 930 F.2d 396, 400 (5th Cir. 1991)(good-faith exception applies to warrantless arrests); United States v. Towne, 870 F.2d 880, 885 (2d Cir. 1989), cert. denied, 490 U.S. 1101 (1989); Durio v. State, 807 S.W.2d 876, 878 (Tex. Crim. App. 1991); Childress v. United States, 381 A.2d 614, 618 (D.C. Ct. App. 1977); State v. Lanoue, 587 A. 2d 405, 407 (Vt. 1991); Commonwealth v. Riley, 425 A.2d 813, 816 (Pa. Super. Ct. 1981).

had no need to address the "good-faith" issue in reaching its decision, there is still validity to the basic point that one must look to the lawfulness of the underlying arrest to determine the admissibility of the evidence seized, rather than immediately analyze the warrantless search under some "good-faith" exception to the exclusionary rule.

Post-Leon cases have acknowledged the wisdom of determining the admissibility of evidence seized pursuant to a warrantless search incident to an arrest by examining the lawfulness of the underlying arrest, rather than by merely applying a "good-faith" test to the seizure. See, e.g., State v. Gough, 519 N.E.2d 842, 844 (Ohio Ct. App. 1986)(Whiteley applies rather than Leon when defendant arrested pursuant to invalidly issued bench warrant); Dean v. State, 466 So. 2d 1216, 1218 (Fla. Dist. Ct. App. 1985)(principles underlying Leon evoke different policy considerations than case involving unlawful arrest). Further, when assessing the lawfulness of the arrest, it is still appropriate to determine the issue by looking at the collective knowledge of the officers involved in the transmission and receipt of information pertaining to the arrest. See, e.g., People v. Mourecek, 566 N.E.2d 841, 845 (Ill. App. Ct. 1991)(good-faith exception not applicable where officer relying on electronically communicated information which turns out to be stale); People v. Joseph, 470 N.E.2d 1303, 1306 (Ill. App. Ct. 1984)(good-faith reliance of officer in acting upon information provided through police channels cannot overcome intrusion upon Fourth Amendment rights); Albo v. State, 477 So. 2d 1071, 1074 (Fla. Dist. Ct. App. 1985)(Leon has no effect where no judicial determination and arrest based wholly upon erroneous information supplied by law enforcement authorities).

In addition to these general principles, an arrest based upon a recalled warrant is one that certainly calls for the application of the exclusionary rule. In such a case, there has been an affirmative decision by a neutral magistrate that the defendant should not be arrested; yet, directly contrary to this independent decision, the defendant is arrested. Since the recall of the warrant conclusively demonstrates the lack of probable cause to arrest, People v. Ramirez, 668 P.2d 761, 764 (Cal. 1983), it is illogical to hold that the arresting officer can maintain a "good-faith" belief in the right to arrest. Such a holding flies in the face of the collective knowledge rule. Id. at 765 (collective knowledge rule imposes on officer obligation to disseminate only accurate information). A determination otherwise would serve to effectively destroy the vitality of Whiteley and Hensley.

C. The Constitution Protects Against Law Enforcement's Unlawful Interference With A Citizen's Rights Regardless Of The Origin Of The Information That Law Enforcement Relies Upon To Effect Its Unconstitutional Actions

Petitioner asks this Court to adopt an exception to the exclusionary rule based upon the fact that the original source of information relied upon by the officer may not have been a "law enforcement" agency. Such a rule would be an unacceptable formulation of constitutional doctrine and unworkable as a rule of constitutional law.

The constitutional principle advanced by petitioner seems to be the following: "If the collective knowledge of 'law enforcement' believes there to be probable cause for an arrest, the fact that this belief is erroneous due to a mistake emanating from an agency that has been denominated 'civilian' creates an exception to the exclusionary rule."

Following such a view invites the adoption of an even more simple approach by "law enforcement": denominate all record-gathering agencies "civilian" and don't worry about whether they ever update their records.[7]

The practice of making radio checks with centralized computer data banks is a routine practice in hundreds of thousands of cases nationwide. Baker v. McCollum, 443 U.S. 137, 155 (1979)(Stevens, J., dissenting). The risk of misidentification emanating from these computer checks is substantial. Id. at 155-156; see Maney v. Ratcliff, 399 F. Supp. 760, 764-765 (E.D. Wis. 1975)(factual recitation of repeated arrests of individual because information never withdrawn from NCIC).[8] The most common scenarios for

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[7] See, e.g., Albo v. State, 477 So. 2d 1071, 1076 (Fla. Dist. Ct. App. 1985)("A contrary holding--which would sanction evidence seized through the arrest of a citizen merely because he has once been legally subject to apprehension--would affirmatively encourage the careless, perhaps deliberately neglectful failure to delete names from the proscribed list on what would then be the correct theory that the longer the list, the more persons subject to search and the consequent seizure of admissible evidence."); see also State v. Gough, 519 N.E.2d 842, 846 (Ohio Ct. App. 1986)("We recognize that a law enforcement official placing a name on a list can be just as great a threat to liberty as one who batters down a door without a warrant.").

[8] There does not appear to be any published figure as to the extent of the inaccurate reporting in a data bank such as the NCIC, but a random survey by the FBI Identification Bureau revealed a large percentage of apprehended fugitives had not been cancelled from the data bank. Patrick

unlawful arrests pursuant to inaccurate entries in data systems are those situations where warrant information is improperly entered, or where a warrant was initially issued but subsequently recalled, and the warrant is not removed from the data system. See, e.g., United States v. Mackey, 387 F. Supp. 1121, 1123 (D. Nev. 1975); People v. Fields, 785 P.2d 611, 614 (Colo. 1990); People v. Mitchell, 678 P.2d 990, 991-992 (Colo. 1984); People v. Ramirez, 668 P.2d 761, 763 (Cal. 1983); State v. Trenidad, 595 P.2d 957, 957-958 (Wash. Ct. App. 1979).

The situation represented by the instant case is not uncommon. "[T]he situation here reflects the growing problem evolving from police reliance on electronically recorded and disseminated criminal files. When these computerized records are not kept up to date, a citizen may be subject to deprivation of his liberty without legal basis." People v. Joseph, 470 N.E.2d 1303, 1306 (Ill. App. Ct. 1984). Despite this truism, petitioner seeks to draw a distinction between the application of the exclusionary rule based upon whether the information that resulted in the unlawful deprivation of a citizen's liberty originated from a "law enforcement" or "civilian" agency. Proffering such a distinction misapprehends the nature of the harm and creates an artificial basis for distinguishing between "law

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Hand, Note, Probable Cause Based on Inaccurate Computer Information: Taking Judicial Notice of NCIC Operating Policies and Procedures, 10 Fordham Urb. L.J. 497, 498 n. 8 (1982). A survey of criminal history data systems indicated that only one in four dispositions was reported accurately and completely. See Donald L. Doernberg & Donald H. Ziegler, Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems, 55 N.Y.U. L. Rev. 1110, 1113 (1980).

enforcement" and "civilian" agencies when it comes to electronic data storage.

The distinction between "law enforcement" and "civilian" record-keeping clearly serves no purpose in analyzing the harm done to the citizen who has been unlawfully arrested. It makes no difference to that person who the agency of harm was; the harm has been rendered regardless of the miscreant. The only reason to create this artificial distinction between governmental agencies is for the purpose of defining an exception to the exclusionary rule. "The state should not benefit from compartmentalizing its responsibility to the public into separate but obviously interdependent agencies without some rationale to support this result." State v. Lanoue, 587 A.2d 405, 408 (Vt. 1991)(Morse, J., dissenting). The rationale for the distinction made by Leon is clear: the intervention of a neutral and detached magistrate helps to safeguard a citizen's rights. There is no comparable rationale to justify the distinction the petitioner seeks in this case.[9]

The distinction is also one that may prove to be illusory when an attempt is made to apply it to a particular fact situation. For example, two different jurisdictions have reached different conclusions as to whether the department of motor vehicles is a "law enforcement" agency. Compare

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[9] Amicus acknowledges that some courts have referred to the fact that it was a law enforcement agency that produced the inaccurate information. See, e.g., Albo v. State, 477 So. 2d 1071 (Fla. Dist. Ct. App. 1985); People v. Joseph, 470 N.E.2d 1303 (Ill. App. Ct. 1984). However, these courts note this distinction as an historical fact, and do not engage in reasoned discussion as to why this is or is not a determining factor in the result reached.

State v. Lanoue, 587 A.2d 405, 407 (Vt. 1991)(not law enforcement agency) with Albo v. State, 477 So. 2d 1071, 1075 n. 4 (Fla. Dist. Ct. App. 1985)(law enforcement agency). Additionally, it may not always be clear whether the origin of the information was from a "law enforcement" agency, or whether an otherwise "civilian" agency is serving a function typically associated with law enforcement. See, e.g., State v. Trenidad, 595 P.2d 957, 857-958 (Wash. Ct. App. 1979)(arrest based on civil bench warrant issued by Department of Social and Health Services). Further, what is the resolution if the incorrect information comes from both a "law enforcement" agency and a "civilian" agency?[10]

Even the fact situation represented by this case would yield different results in different jurisdictions if the petitioner's theory is adopted. The assumption in this case seems to be that the clerk of the justice court is a judicial branch employee. Assuming that to be true in this case, that is hardly a universal status for such clerks. In many jurisdictions the clerks are employed by a separate district or county clerk's office that is unconnected to the judicial branch. Further, in some jurisdictions the courtroom bailiff has responsibility for entering data of the type at issue here. We submit that the most important function served by this

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[10] For example, it has been noted that in Hamilton County, Ohio, an officer in a patrol car radios a license number to the dispatcher, who then enters it into a data terminal which displays all the information on file at the regional computer center and at the state and federal levels pertaining to the owner's criminal record. Doernberg and Zeigler, supra, n. 303, at 1174. It is not unlikely in this day and age that officers will have access to more than one data bank of information, and that the same information may come from both "law enforcement" and "civilian" data banks.

Court is to fashion broadly applicable rules of law that are based upon constitutional principles, and not rules that are dependent upon the whim of the way a state government or court chooses to classify particular agencies or employees. The fact that an exception to the exclusionary rule can only be advanced upon such haphazard distinctions augurs poorly for its application as a rule of law.

D. The Purpose Of The Exclusionary Rule is Furthered By Applying It Under The Facts Of This Case

The Leon Court noted that if the exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, it must alter the behavior of individual law enforcement officers or the policies of their departments. Leon, 468 U.S. at 918. It has been observed that the exclusionary rule presses police departments and state attorney's offices into a closer working relationship; thus creating an institutional deterrent effect. See Myron W. Orfield, Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. Colo. L. Rev. 75, 80 (1992).[11] The institutional deterrent effect of the exclusionary rule would be better served by not creating the exception being sought by petitioner.

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[11] During Senate hearings, Stephen Sachs, Attorney General of Maryland, testified that "[i]n my state Mapp has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years." The Exclusionary Rule Bills: Hearings Before the Subcom. on Criminal Law of the Comm. of the Judiciary, United States Senate on S. 101, S. 751 and S. 1995, 97th Cong., 1st & 2d Sess. 41 (1982).

A logical interpretation of Leon is that the good-faith exception it created bears a rational relationship to the Fourth Amendment's preference for searches with warrants. By seeking the approval of a magistrate, and thus attempting to comply with the Fourth Amendment warrant requirement, law enforcement can avail itself of the good-faith exception. If deterrence of improper law enforcement activities is the sole goal of the exclusionary rule, the Leon exception makes sense when placed in this limited context, because it encourages an officer to invite an independent examination of his or her decision to search.

In the context of this case, the goal to be served by the exclusionary rule should be to encourage accuracy in record compilation by those agencies supplying computerized data to the criminal justice system.[12] "Suppressing the fruits of an arrest made on a recalled warrant will deter further misuse of the computerized criminal information systems and foster more diligent maintenance of accurate and current records." People v. Ramirez, 668 P.2d 761, 765 (Cal. 1983). The maintenance of accurate and current records is a key byproduct of the application of the exclusionary rule to the instant facts. The computer inaccuracy in this case, "even if unintended, amounted to a capricious disregard for the rights

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[12] Computerized information is no more accurate than data compiled manually, but because of the increased accessibility for computerized data, the effect of its inaccuracies is magnified. See Hand, supra, at 498; see also People v. Joseph, 470 N.E.2d 1303, 1306 (Ill. App. Ct. 1984)("[t]he situation here reflects the growing problem evolving from police reliance on electronically recorded and disseminated criminal files. When these computerized records are not kept up to date, a citizen may be subject to a deprivation of his liberty without any legal basis.").

of the defendant as a citizen of the United States." United States v. Mackey, 387 F. Supp. 1121, 1125 (D. Nev. 1975). Further, although petitioner advances the view that the deterrent goal of the exclusionary rule may not be advanced in this case since the inaccuracy originated with a "civilian" agency, the passive recipient theory has been rejected when previously proffered, and it has been held that law enforcement has some duty to insure the accuracy of information it eventually disseminates. Id. at 1123.

There has been no demonstration by petitioner that applying the exclusionary rule in this case fails to serve the deterrent effect of helping to combat inaccurate computerized record keeping of criminal data.[13] The exclusionary rule goal of acting as a systemic deterrent was not rejected by the Leon Court. It merely observed that to the extent the exclusionary rule was thought to operate as a systemic deterrent on a wider audience than law enforcement, it would not operate as such for judicial officers. Leon, 468 U.S. at 917. There is a well-established belief for this due to the role of the independent magistrate in our justice system. However, there is no well-established role for other functionaries that would be covered by a broad rule that exempts all non-law enforcement agencies from the exclusionary rule. In fact, many "civilian" agencies, such as the department of motor vehicles, play a role much more akin

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[13] The goal to be served is encouraging the accuracy of criminal data that is used by arresting officers, no matter the source of its origination or where it is stored. Courts have recognized this goal by holding that the proper inquiry is whether inaccurate information has been left in the criminal justice system records through the fault of the system. Pesci v. State, 420 So. 2d 380, 382 (Fla. Dist. Ct. App. 1982); People v. Jennings, 430 N.E.2d 1282, 1283 (N.Y. 1981).

to that of a law enforcement agency than to the role played by an independent magistrate.

Finally, before the Court crafts an additional exception to the exclusionary rule, one must consider the broader implications of the proposed exception. It is of great significance that the proposed exception relates to an already created exception to the general search warrant requirement; an exception that exists only because of the assurance that an arrest has been made based upon probable cause. In a world where warrantless searches incident to arrest "outnumber manyfold searches covered by warrants,"[14] creating an exception that permits the government to introduce evidence seized without a warrant, based upon an arrest lacking in probable cause, is turning a blind eye to the constitution.[15]

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[14] See Telford Taylor, Two Studies in Constitutional Interpretation 48 (1983).

[15] See Dripps, supra, at 944 ("[A] good faith exception for warrantless searches risks trivializing the constitution."); see also Philip Soper, A Theory of Law 87 (1984)("The seriousness of the obligation is directly proportional to the seriousness, as indicated by the severity of the attached sanctions, with which those who demand other's compliance will view disobedience.").

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted.

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